UNITED STATES – CERTAIN MEASURES AFFECTING IMPORTS OF POULTRY FROM CHINA

(WT/DS392)

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

March 15, 2010

1. China's second submission makes six arguments in an effort to undermine Section 727's necessity and to demonstrate that the measure is applied in a manner that would constitute arbitrary or unjustifiable discrimination against China. China's arguments often miss the point and frequently mis-characterize the U.S. position. China also overlooks the fact that Section 727 was an act of congressional oversight taken in the context of an ongoing equivalence proceeding.

2. China's first substantive Article XX(b) argument is that Section 727 denied China access to the PPIA. However, this is not the question presented. There is nothing in the GATT provisions China cites requiring a Member to utilize a particular set of procedures when evaluating whether another Member's system ensures the safety of its exported food. In fact, there is nothing that speaks to providing an exporting Member with "access" to any procedures.

3. Rather, the question presented is whether food exported from a Member poses risks to life or health such that it is necessary for the importing Member to take steps to ensure that the exported food will be safe. That is what the United States did here. The United States was faced with a situation where China had massive food safety problems and had overhauled its food safety system while a process was underway to ascertain and ensure the safety of exports of Chinese poultry. It was in this context that Congress took the steps it deemed necessary to ensure the safety of the U.S. food supply with respect to Chinese poultry exports.

4. There are many legitimate steps a Member could take to ensure food safety within this context. A Member could decide that it could not complete an equivalence process until after it sought additional information, additional audits, further explanation, or additional scientific studies. Section 727, which provided that the United States could not complete its equivalence process for a short time while additional work was underway, was also a legitimate step.

5. Thus, China's argument is simply incorrect because it overlooks that Section 727 was a normal act of congressional oversight taken in the context of an ongoing equivalence proceeding. Congressional oversight is commonplace in the U.S. system of governance. In this instance, Congress enacted Section 727 to ensure that FSIS protected life and health by fully considering China's systemic food safety enforcement problems and new food safety law before establishing or implementing equivalence rules for Chinese poultry. Congress's action was not separate and apart from the U.S. system to ensure the safety of imported food, but is a part of that system. Had an executive branch official taken action to ensure that China's enforcement problems were fully considered, we doubt that we would even be before this Panel today.

6. Putting this aside, the United States agrees with China that Section 727 did not allow FSIS to undertake every possible aspect of the equivalence procedure. In fact, for a short time period, FSIS could not complete two specific tasks. FSIS could not use funding to "establish" a rule related to Chinese slaughtered poultry and it could not use funding to "implement" a rule related to Chinese processed poultry. However, Section 727's impact went no further and did not prevent FSIS from conducting activities related to China's equivalence application, including specific PPIA activities. As a result, China was not denied access to the PPIA.

7. China also suggests that whether FSIS could take related activities is "ultimately irrelevant." However, FSIS's ability to conduct this work during Section 727's applicability is far from meaningless. Indeed, FSIS's ability to engage in related work underscores Section 727's contribution to its objective and its limited trade restrictiveness. In this context, China's submission incorrectly asserts that FSIS's equivalence-related actions during 2009 were

"minimal." To the contrary, FSIS did considerable work related to China's equivalence application including the development of an action plan, steps under the action plan, and steps to improve its equivalence process. FSIS could have done more had China been responsive to its request for information about its food safety overhaul.

8. China concedes it did not respond to the U.S. request of May 12, 2009, but relies on notifications made much later to the SPS Committee. In addition, the regulations were not effective until December 1, 2009. It was reasonable for the United States to want to know what changes China was making to its system, how they would operate in the real world, and how they would affect China's poultry inspection system. Yet China did not find it important to respond.

9. China's second argument is that Section 727 was not necessary to protect life and health because imports of Chinese poultry were not imminent when Section 727 was enacted. China quotes a U.S. response to questions noting that "China was not in a position to immediately export poultry products to the United States at the time the funding restriction was enacted."

10. China misses the point. By stating that China would not have been able immediately to export poultry in Section 727's absence, the United States was illustrating the measure's limited restrictiveness by contrasting it with other measures that would have impeded products upon enactment, such as an import ban. Further, the need for FSIS to conduct certain procedures before China could export poultry does not undermine Section 727's necessity. Implementing or establishing equivalence rules is one, significant step in the process by which China could ship poultry to the United States. It was important that this step only be taken when there was reason to be confident that poultry exports would be safe. Additionally, the equivalence review process that China refers to could have been completed within the period set by the measure, and even if it could not, this is irrelevant. After all, the need for protection begins with the first shipment of Chinese poultry and continued into the future to protect against every shipment of Chinese poultry that could enter the United States and harm consumers if FSIS were to "establish" or "implement" equivalence rules without fully considering China's systemic food safety problems.

11. China also attempts to use the fact that FSIS theoretically could have considered China's systemic food safety problems in Section 727's absence as evidence against its necessity. However, it is typical for a Member to have different options to ensure food safety. The mere existence of these options does not mean that any given option is not "necessary." Chinese poultry exports posed a risk, and it was necessary to be sure that these exports were safe to protect life or health. The fact that there might be another way to do so does not take away from Section 727's necessity.

12. China also ignores that FSIS had never before made an equivalence determination for a Member with such widespread food safety crises and systemic problems like China. As a result, there were strong concerns that FSIS did not and would not fully account for these novel risks. Accordingly, Section 727 was necessary to focus FSIS's attention on these problems to ensure they were fully considered before equivalence rules were established or implemented to ensure life and health was protected.

13. China's third argument relates to the differences between FSIS and FDA procedures for ensuring the safety of imported food. China argues that "the United States cannot justify having blocked application of only FSIS procedures by suggesting that equivalency systems involve greater risk than other types of food import procedures."

14. China ignores the significant measures taken to protect life and health from the risk posed by FDA-regulated Chinese products, including import alerts and efforts to deal with China's serious, and unfortunately, still ongoing, melamine crisis. The fact that these measures were necessary to protect life and health for FDA-regulated products does not undermine the fact that Section 727 was necessary to protect from the risk posed by Chinese poultry.

15. Section 727's necessity was in large part due to concerns about China's food safety enforcement track record. China's food safety enforcement problems raise particularly serious concerns under an equivalence regime because FSIS heavily relies on the exporting country to enforce its laws to ensure that the U.S. level of sanitary protection is being met. While FSIS does conduct audits and re-inspections, these measures are not sufficient to protect life and health. FSIS's re-inspections simply monitor compliance with certification and labeling requirements. It is the equivalence determination itself that is FSIS's primary tool to protect life and health.

16. China's fourth substantive argument involves its widespread problems with avian influenza (AI). China's argues that since it is not the only country that has suffered from the highly pathogenic strain of the virus, its AI problems do not support Section 727's necessity.

17. China's argument overlooks key facts related to AI. China points out that more than 80 countries have been affected by highly pathogenic avian influenza, but China fails to mention that it is one of only 15 of these countries that the OIE has classified as having current unresolved disease events, infection present, or demonstrated clinical disease. China also argues that Section 727 was not justified by AI concerns because cooked poultry cannot transmit the disease. However, under APHIS's requirements to protect against AI, China would have to certify that its poultry is fully cooked or otherwise processed sufficiently. APHIS would be relying on China to make this certification and enforce the related requirements. In this context, China's problems with the enforcement of its laws raise concerns about whether China's poultry inspection system could be relied upon to protect against the potential spread of AI.

18. China's fifth argument involves the various poultry-related crises that have been cited by the United States in this dispute. According to China, these crises are not relevant to the risk posed by Chinese poultry. China also points out that other countries, such as the EU member States, have accepted poultry imports from China in recent years.

19. Again, China's arguments avoid or overlook key facts. China argues that its chicken feed crises are not relevant to the safety of Chinese poultry because contaminated chicken feed does not increase the risk of consuming the related poultry meat. However, China fails to mention that China's Health Secretary responded to the chicken feed crisis by announcing that all Chinese chicken meat would be tested for melamine to ensure that it was safe to eat. Similarly, China notes that the EU currently accepts Chinese poultry, but avoids the fact that the EU banned Chinese poultry for six years from 2002 to 2008. Perhaps China does not raise this issue because the EU's ban on Chinese poultry was largely based on concerns about AI in China, an issue China argues is not relevant to the safety of Chinese poultry.

20. China's sixth argument is an attempt to demonstrate that Section 727 is applied such that it discriminates against China in an arbitrary or unjustifiable manner. In short, China argues that the same conditions prevail in China and in other countries not within Section 727's scope.

21. China's discrimination arguments are not persuasive. By its very nature, any action taken in the context of an equivalence review of a country's food inspection system may make explicit

reference to that country alone. This country-specific nature of an equivalence review does not automatically raise questions of arbitrary or unjustifiable discrimination. China was the only country whose poultry product exports raised such a high level of concern for food safety and that was subject to an imminent equivalence determination at the time Section 727 was enacted. Therefore, it simply would not have made sense to apply this measure to other countries. Further, Section 727's treatment of China was not arbitrary or unjustifiable due to well-established concerns about China's food safety enforcement problems and its food safety crises.

22. In determining whether Section 727 was applied against China in an arbitrary or unjustifiable manner, China argues that it should be compared with all other Members. However, a comparison of this nature does not make sense. After all, most Members have never attempted to export poultry to the United States and there would never be a reason to enact a measure like Section 727 with regard to their products. Instead, the proper comparison for Article XX purposes is between China and those Members whose poultry inspection systems had already been found equivalent or those Members who had progressed far enough along in the equivalence process such that a determination was imminent. It is these Members who were similarly situated as China in that they had an expressed desire to export poultry to the United States, acted on that desire, and were in a position to be able to export in the near future.

23. Among these Members, China's application stands out for its unique concerns. No other Member who has been found equivalent or who is nearing an equivalence determination has had such severe enforcement problems or massive food safety crises. Another distinction is that many of these Members had been exporting poultry or meat to the United States for many years without incident before they were found equivalent under FSIS's current equivalence regime. Thus, at the time these WTO Members were subject to FSIS's equivalence process for poultry, FSIS already had a familiarity with them and confidence in their inspection systems for ensuring the safety of the products that they exported to the United States. By contrast, China had never before exported poultry or meat to the United States when it applied for equivalence in 2004.

24. Among these Members, China spends a lot of time comparing itself with Mexico. We agree that FSIS's audit reports on Mexico are troubling. In fact, the 2008 audit that China cites led FSIS to suspend Mexico from being able to export poultry products to the United States. However, FSIS's reports on China are also troubling. For example, for every single Chinese slaughtering facility that FSIS audited in 2005, it concluded: "If this establishment were certified to export to the U.S., this establishment would be immediately delisted."

25. Despite the fact that FSIS's audits of both China and Mexico raised concerns, this comparison does not prove discrimination. Unlike China, Mexico was not in the middle of an ongoing equivalence proceeding in which new rules had to be implemented and established to allow Mexico to export poultry to the United States at the time Section 727 was enacted. Additionally, Mexico had a long history of exporting meat and poultry products to the United States at the time of the audit, which gave FSIS confidence that Mexico would work to resolve the problems it identified during the audit as it had done in the past. More fundamentally, China's discrimination argument appears to rest on a faulty premise. China asserts that it was discriminated against because FSIS continued to work with Mexican officials to resolve its issues while by enacting Section 727, FSIS was refusing to work with China. However, to the contrary, FSIS did engage in work related to China's equivalence application during 2009 and did reach out to China so it could do even more work on this matter.

26. China also has no basis for an Article I claim. China's argument misses the point of an equivalency-based regime. Many of a Member's actions taken in implementation of an equivalency-based food-safety regime will differ for different Members, depending on the specific facts and circumstances of that Member's status in the process of applying for a determination of equivalency. China tries to get around this fundamental point by claiming that the U.S. measure is somehow different than a regulatory action, because it was adopted by the U.S. Congress as opposed to FSIS, the U.S. regulator. China's argument, however, relies on an artificial distinction between procedures administered only by FSIS, and the broader U.S. system of ensuring food safety, which includes congressional oversight. This distinction has no basis in the WTO Agreement. The fact that the particular exercise of oversight involved in this dispute applied to one Member does not establish an Article I violation, just as the fact that a specific FSIS regulatory action applied to only one Member would not establish an Article I violation.

27. In addition, China has provided no explanation for why poultry products from China are "like products" to poultry products from other WTO Members, including those already authorized to export poultry products to the United States. China's"hypothetical like product" approach is circular. China is assuming that its exports of poultry products would be as safe as exports from other Members, yet that is the point of an equivalency process.

28. China's claims under the SPS Agreement are not within the terms of reference because China failed to request consultations under the SPS Agreement. China characterizes this issue as one of an "initial" failure by the United States to understand China's consultations request, and that the matter was subsequently clarified in further communications from China. The issue here is not a matter of misunderstanding: China stated that it considered that the SPS Agreement did not apply, and China would only request consultations under the SPS Agreement in the future if there were a subsequent demonstration that any U.S. measure was subject to the SPS Agreement. Thus, under the plain meaning of China's consultations request, and as China has confirmed, China would only have requested consultations under the SPS Agreement well after this panel process began. Accordingly, China had not invoked the SPS Agreement, nor consulted under it, such that the SPS Agreement could be within the terms of reference of the Panel.

29. Thus, the question is whether the DSU allows a Member to include claims under a covered agreement without seeking consultations under that agreement. Members agreed in the DSU to the rules that would apply in invoking the DSU. China has not followed those rules, but still asserts that it is entitled to the mechanisms under the DSU. If China's approach here were to be accepted, it would be in derogation of the agreed rules, would undermine the usefulness of the consultation process, and lead to uncertainty and confusion in all future disputes.

30. China's second submission also argues that the United States has not "advanced a claim that the consultations request affected the United States' due process rights." Although the United States has not used that phrase, certainly "due process" must include the right to have disputes conducted in accordance with the rules set out in the DSU, and those rules also serve to protect the rights of other Members.